

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VALERIE ROGAN,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendants.

NO. 08-0794RAJ

ORDER

**I. INTRODUCTION**

This matter comes before the court on Defendants' motion for summary judgment (Dkt. # 13). The court has considered the parties' briefing and supporting evidence, and has heard from the parties at oral argument. For the reasons explained below, the court GRANTS the motion (Dkt. # 13) and REMANDS the remaining state law claims to King County Superior Court.

**II. BACKGROUND**

Since 1983, Plaintiff Valerie Rogan has been licensed by Washington's Department of Social and Health Services ("DSHS") to operate a childcare facility known as Hart's Day Care ("Hart's") in her home.

1 On December 3, 2004, DSHS received an allegation that Hart's used electric  
2 "scat mats," which are intended to control the behavior of indoor pets, in a crib to  
3 control the behavior of children. That same day, DSHS's Division of Child Care and  
4 Early Learning ("DCCEL") suspended Rogan's license to operate a childcare facility.  
5 Defendant Patricia Eslava-Vessey initiated a DCCEL investigation, and Defendant  
6 Harriett Martin was assigned to investigate. DSHS's Department of Licensing  
7 Resources ("DLR") and Child Protective Services ("CPS") also investigated the  
8 allegation, with Defendant Sandra Duron as investigator.  
9

10 Rogan appealed the DCCEL license suspension. An administrative law judge  
11 stayed the suspension of Rogan's childcare license and Hart's reopened on February  
12 22, 2005. DSHS then revoked Rogan's license in April 2005, and denied her request  
13 for license renewal in June 2005. In June 2006, an administrative law judge reversed  
14 DSHS's revocation of Rogan's license and denial of her renewal request. In August  
15 2006, the DSHS Board of Appeals reversed the administrative law judge's June order.  
16 In August 2007, King County Superior Court vacated the DSHS Board of Appeals  
17 order and reinstated the administrative law judge's order reversing the revocation.  
18

19 In April 2008, Rogan filed this lawsuit against DSHS,<sup>1</sup> Eslava-Vessey, Martin,  
20 Duron and Mary Roach (a DCCEL licenser),<sup>2</sup> alleging claims under 42 U.S.C. § 1983  
21 for violations of her constitutional rights, and state law claims for intentional infliction  
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23 <sup>1</sup> The parties agree that DSHS is not subject to liability under Section 1983. Although Plaintiff claims she never  
24 intended to bring a Section 1983 claim against DSHS, *see* Pltf.'s Resp. (Dkt. # 18) at 23, the Complaint is less  
25 than clear as to precisely which Defendant(s) are being sued under Section 1983. *See* Complaint VII.1 (asking  
26 the court to "adjudge *Defendant* liable to Plaintiff under 42 U.S.C. § 1983") (emphasis added).

<sup>2</sup> Plaintiff's counsel conceded at oral argument that Duron and Roach should be dismissed as Defendants, so the remainder of this order addresses only the Section 1983 claims against the remaining individual Defendants, Martin and Eslava-Vessey.

1 of emotional distress, negligent infliction of emotional distress, and negligent  
2 investigation. The Defendants removed the case to this court, and now seek dismissal  
3 of Rogan's federal claims.

### 4 5 **III. ANALYSIS**

#### 6 **A. Standard of Review on Summary Judgment.**

7 Summary judgment is appropriate if there is no genuine issue of material fact  
8 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
9 The moving party bears the initial burden of demonstrating the absence of a genuine  
10 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the  
11 moving party meets that initial burden, the opposing party must then set forth specific  
12 facts showing that there is a genuine issue of fact for trial in order to defeat the motion.  
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

#### 14 **B. Eslava-Vessey is Entitled to Absolute Immunity for Her Initiation of the 15 License Revocation Proceeding.**

16 The Defendants contend that Martin and Eslava-Vessey should be granted  
17 either absolute or qualified immunity from Rogan's 42 U.S.C. § 1983 claims.<sup>3</sup> Section  
18 1983 creates a remedy for violations of constitutional and other federal rights by  
19 defendants who act under color of state law. *Motley v. Parks*, 432 F.3d 1072, 1077  
20 (9th Cir. 2005).

21 Absolute immunity from suit covers those who perform functions considered  
22 immune under common law, and only to the performance of those functions. *See*  
23 *Miller v. Gammie*, 335 F.3d 889, 897 (9th Cir. 2003). Social workers are entitled to

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24 <sup>3</sup> Rogan contends that the Defendants waived the right to raise immunity questions by not raising them earlier.  
25 She has provided no authority to support this argument. It is true that, in order to preserve the effect of immunity  
26 from suit, immunity questions should be resolved as early as possible. *See Saucier v. Katz*, 533 U.S. 194, 200-01  
(2001). But the court is not aware of any authority requiring a defendant to raise an immunity issue at any  
particular stage in a proceeding, and thus will not further consider Rogan's waiver argument.

1 absolute immunity from suits based on the the performance of quasi-judicial or quasi-  
2 prosecutorial duties, such as the execution of a court order, initiating judicial  
3 proceedings, or advocacy before an impartial decisionmaker. *See Miller*, 335 F.3d at  
4 898; *Caldwell v. LeFaver*, 928 F.2d 331, 333 (9th Cir. 1991); *Coverdell v. Dep't of*  
5 *Soc. & Health Servs.*, 834 F.2d 758 (9th Cir. 1987). On the other hand, a social  
6 worker's duties related to discretionary decisionmaking and recommendations are not  
7 functions that would entitle him or her to absolute immunity; instead, qualified  
8 immunity would apply:

9  
10 To the extent [] that social workers also make discretionary decisions  
11 and recommendations that are not functionally similar to prosecutorial or  
12 judicial decisions, only qualified, not absolute immunity, is available.  
13 Examples of such functions may include decisions and recommendations  
as to the particular home where a child is to go or as to the particular  
foster parents who are to provide care.

14 *Miller*, 335 F.3d at 898. The official claiming absolute immunity for a particular  
15 function has the burden to show that the function has a common-law counterpart that is  
16 absolutely immune. *Id.* at 897.

17 Martin and Eslava-Vessey contend that they are entitled to absolute immunity  
18 for their participation in the revocation of Rogan's childcare license. Eslava-Vessey  
19 initiated the revocation process and Martin performed the investigation that led to the  
20 revocation, and they claim that these functions are quasi-prosecutorial in nature.

21 The court agrees that absolute immunity shields Eslava-Vessey from suit based  
22 on her initiation of the license revocation proceeding, because that conduct is similar  
23 to initiating a criminal proceeding, a function for which prosecutors enjoy absolute  
24 immunity. *See Beltran v. Santa Clara County*, 514 F.3d 906, 908 (9th Cir. 2008)  
25 (finding a social worker who initiated a dependency proceeding to be absolutely  
26 immune from suit based on that conduct, for the same reasons that a prosecutor who

1 initiates a criminal proceeding is absolutely immune from suit based on that conduct).  
2 Thus, Rogan's Section 1983 claim against Eslava-Vessey must be dismissed to the  
3 extent that it is based on her initiation of the license revocation process.

4 Martin's investigatory conduct, however, is not similar to an absolutely immune  
5 prosecutorial function. As the *Beltran* court held: "[A]s prosecutors and others  
6 investigating criminal matters have no absolute immunity for their investigatory  
7 conduct, *a priori*, social workers conducting investigations have no such immunity."  
8 514 F.3d at 908-09. Thus, because Martin's investigatory conduct does not entitle her  
9 to absolute immunity, the court turns to consider whether Martin is entitled to qualified  
10 immunity.

11 **C. Rogan's Allegations Fail to Establish that Her Constitutional Rights were**  
12 **Violated.**

13 Qualified immunity from suit applies to a public official whose discretionary  
14 conduct "does not violate clearly established statutory or constitutional rights which a  
15 reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818  
16 (1982). To determine whether an official is entitled to qualified immunity, the court  
17 applies a multi-part test: First, the court inquires as to whether a violation of a  
18 constitutional right been established, if the facts alleged are viewed in the light most  
19 favorable to the plaintiff. If yes, then the court must determine whether the law was  
20 clearly established at the time the violation occurred, such that a reasonable official  
21 would know that his or her actions violated the law. *Saucier v. Katz*, 533 U.S. 194,  
22 201 (2001). If the plaintiff's allegations do not establish that a constitutional right was  
23 violated, then the court's inquiry ends and it must dismiss the claim based on the  
24 plaintiff's failure to state a Section 1983 claim. *Id.*

1 Rogan generally contends that her constitutional right to due process was  
2 violated, although she has been less than clear as to what specific conduct constitutes  
3 the violation.<sup>4</sup> The closest Rogan comes to a specific allegation related to due process  
4 is: “A reasonable licensor would know that a licensee is entitled to notice and an  
5 opportunity to be heard prior to a finding being made,” in reference to two letters  
6 Martin wrote to memorialize investigations she performed regarding two child abuse  
7 and neglect allegations.

8 DSHS received two other abuse or neglect allegations regarding Rogan in 2004,  
9 before the December scat mat incident. Both of those allegations were investigated by  
10 Martin. With regard to the first incident, Martin interviewed Rogan and found some of  
11 the allegations to be valid. *See* Defs.’ Supp. (Dkt. # 24), Ex. 9. Martin and Rogan  
12 ultimately completed a compliance agreement. *See id.*, Ex. 11 at 202. As to the  
13 second incident, Martin again interviewed Rogan and found that one of the allegations  
14 was inconclusive, but one was valid. *See id.*, Ex. 10; Ex. 11 at 208-11. These referrals  
15 were considered during Rogan’s license revocation process related to the scat mat  
16 incident. *See id.*, Ex. 11 at 199.

17 The day before Rogan’s administrative hearing in November 2005, she was  
18 faxed copies of letters memorializing Martin’s findings with regard to these two 2004  
19 investigations. *See id.*, Ex. 11 at 201. The letters are dated in 2004, though Rogan did  
20 not receive copies of them until the day before her administrative hearing in 2005. *See*  
21 *id.*, Exs. 9-10.

22 Though it is undisputed that Martin did not send the investigation letters at the  
23 time the investigation was concluded, Rogan has failed to establish that Martin’s  
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25 <sup>4</sup> It is also unclear if Rogan’s claim against Eslava-Vessey is based on conduct other than initiating the  
26 revocation proceeding. To the extent that Rogan attempts to base her claim against Eslava-Vessey on her  
knowledge or ratification of Martin’s conduct, the analysis contained in this section applies equally to Eslava-  
Vessey and Martin.

1 failure to do so violated her right to due process. Martin testified at Rogan's  
2 administrative hearing that until 2005, DSHS did not send findings letters; the licensee  
3 was supposed to call DSHS if he or she wished to know the outcome of an  
4 investigation. *See id.*, Ex. 11 at 211. The letters themselves do not inform the licensee  
5 of appeal procedure or any other right; Martin indeed testified that the findings  
6 memorialized in the letters are not appealable or contestable in any way. *See*  
7 Ruzumna Decl. (Dkt. # 19), Ex. 2 at 38. And though Rogan repeatedly characterizes  
8 the letters as “fabricated” throughout her briefing, she does not contend that the  
9 allegations underlying the letters were fabricated; the only thing allegedly “fabricated”  
10 about the letters is their dates, in the sense that the letters were allegedly not written on  
11 the indicated dates or mailed to Rogan on those dates. But nonetheless, even if the  
12 dates on the letters are inaccurate, Rogan has failed to explain how Martin's back-  
13 dating the letters deprived her of any due process.

14 Furthermore, the court finds no support for Rogan's Section 1983 claim in her  
15 contention that the Defendants are “barred by res judicata and collateral estoppel from  
16 re-litigating the issue of whether Ms. Rogan's constitutional rights were violated by  
17 the proffer of fabricated evidence by [DSHS],” because King County Superior Court  
18 already made such a finding. *See* Pltf.'s Resp. (Dkt. # 18) at 28. But King County  
19 Superior Court never found that Martin's conduct or any conduct related to the referral  
20 letters violated Rogan's constitutional rights. King County Superior Court did find  
21 that Rogan's due process right was violated, but not because of Martin's conduct. The  
22 order states that the review judge's application of the wrong standard of review  
23 violated Rogan's right to due process. *See* Defs.' Mot. (Dkt. # 13), Ex. H. The court  
24 further found that to the extent that the review judge relied upon the two 2004 referrals  
25 memorialized in the letters “to treat the current action as a licensing action, [the review  
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1 judge's order] is arbitrary and capricious." *Id.* ¶ 2.4. This finding does not refer to  
2 Martin's conduct or even the letters themselves; it relates only to whether the referrals  
3 establish that the current action was a licensing action. Thus, the King County  
4 Superior Court order does not contain any support for Rogan's Section 1983 claim nor  
5 her res judicata or collateral estoppel arguments.

6 Thus, because Rogan has not shown that Martin's conduct related to the  
7 findings letters violated her constitutional rights, and has not identified any other  
8 specific conduct that amounts to a constitutional violation, she has failed to state a  
9 valid Section 1983 claim. Rogan's claim against Martin must be dismissed.

#### 10 IV. CONCLUSION

11 For the reasons explained above, the Defendants' motion (Dkt. # 13) is  
12 GRANTED, and Plaintiff's Section 1983 claims against Duron, Roach, Martin, and  
13 Eslava-Vessey are dismissed. The remaining state law claims are REMANDED to  
14 King County Superior Court.

15 DATED this 18<sup>th</sup> day of May, 2009.

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19 The Honorable Richard A. Jones  
20 United States District Judge  
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